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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 452.

GEORGE A. ADAMOS,
Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent
(Appellee Below).

REPLY BRIEF ON BEHALF OF PETITIONER.

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Reply Brief on Behalf of Petitioner.

This court, on October 8, 1934, granted a writ of certiorari in the case of Enelow vs. New York Life Insurance Company, No. 47 October Term, 1934, where the same question is involved. If the Enelow case is reversed, it naturally follows that the order made in this case (R. 35) is erroneous and should be reversed.

We will not be drawn into a contest on the false issue which respondent seeks to raise, viz: whether, if this case be tried before a jury, the Court would be bound to direct a verdict for respondent. That is not the question before the Court, nor do we anticipate that the Court will examine the whole record as it would if it were reviewing the case to determine whether the trial judge was correct in instructing the jury to find for respondent. However, since the alleged fraud was brought in, we want to call attention to just a few simple facts.

The assured was a Greek restaurant keeper, an "ignorant dumb foreigner", as one of respondent's own witnesses, a physician, admitted (R. 70). Another of respondent's witnesses, also a physician, testified that he could not carry on a conversation with the assured in English and used, in his talk with him, a few words of Greek that he knew (R. 85, 94). The assured applied for only $5,000 insurance (R. 218). The "defrauded" insurance company, following the well known custom, sent on *two* policies for $5,000 each, and, after succeeding in placing them, sent on two more unsolicited policies for $5,000 each which they persuaded the assured to accept (R. 129). How the insurance company's examining physician, who spoke only English, could make this ignorant man under-

stand the intricate questions in the application which contained medical terms and difficult words and expressions is a puzzle. Perhaps they were "Greek" to him.

The imposition upon this trusting insurance company must have been terrible. A glance at the application blank (R. 206, 209) will show that. Every question from 1 D to 11, both inclusive,—and they cover the whole subject of assured's habits, health and physical condition,—is answered in the negative. What a perfect specimen, from a physical, social and every other standpoint, they must have believed this 58 year old Greek restaurant keeper to be, for they always believe everything written in the application by their own agent, so they claim, no matter how unbelievable it may be to any one else.* It would be interesting, if the assured were alive, to hear his version of what happened; to learn whether even a third of the questions were put to him, whether the doctor explained to him the meaning of the questions that he was representing the assured as answering "no", whether the doctor asked him if he had ever in his life consulted a physician, for that is what questions 8 to 10 amount to, and, if he did, whether assured said that he had not.

When respondent's argument is examined it is found to contain the following admissions and statements, viz: (1) That no separate suit in equity may be maintained where there is a plain, adequate and complete

* Because it is a matter of public interest to protect and preserve the rights of beneficiaries of life insurance against just such claims by insurance companies, legislatures have made it compulsory for insurance companies to attach copies of the application to the policies so that the applicant might know what answers the agents wrote into the application. To circumvent the requirements of these statutes, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. An interesting case on the subject is New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037 (C. C. A. 3rd Cir.).

remedy at law. (2) That in Phoenix Mutual Life Insurance Co. vs. Bailey, 13 Wall. 516, the insurance company had a plain, adequate and complete remedy at law by pleading in the law suit which was brought against it that the policy was obtained by means of false and fraudulent answers in the application. (We say respondent admits this because it does not argue that this Court was wrong in the Bailey case.) (3) That such a defense is an equitable defense. (4) That respondent in this case has no adequate remedy at law.

Points 1 and 2 are consistent with each other and are, undoubtedly, correct, but points 3 and 4 contradict 1 and 2, and could not be right if 1 and 2 are correct.

Respondent says, in effect, that it is not concerned with the question whether it has a plain, adequate and complete remedy at law, but what it is interested in is a correct decision of the question "how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated" (7). No one disputes how a *real* equitable defense should be adjudicated under the judicial Code. It is plain as day. By this misstatement of the question involved, respondent hopes to avoid the necessity of showing that its defense is an equitable defense within the meaning of the statute,—that it is of a different character than the defense asserted in the Bailey case.

Respondent says: (8)

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the

> other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Citing authorities.)

There is nothing in this contention. The policy provides that all statements made by the assured "shall, in absence of fraud, be deemed representations and not warranties" (R. 8). Recognizing the effect of the above provision, and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent charged and pleaded such knowledge (Par. 21 Afft. of Def. R. 16). In view, therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers which it charged were knowingly and fraudulently made, and that only a court of equity can give it adequate relief, because in equity it can win its case by merely showing that the answers were material and untrue, without proving that they were made knowingly and with fraudulent intent. The fact that they obtain an order to try this case before a chancellor according to equitable procedure, surely does not change the *issues* in the case.

There is no real basis for claiming that a fraud in equity is different from a fraud in law. It is absurd to make the broad statement that when a party claims, in a suit in equity, that he was induced to do a certain thing by false and fraudulent statements, knowingly made to him, that the scienter need not be proven. We discussed this matter and analyzed the relevant cases in our brief in the Enelow case *(supra)*

where the same contention was made, and in the interest of brevity we omit it here.

Present counsel for petitioner were not concerned in the case prior to the filing of the petition for the writ of certiorari, but the former counsel for petitioner took an exception to the order of court directing the hearing before a chancellor (R. 35) and preserved their rights by assigning the order as an error (R. 245). There is nothing in their conduct that shows a waiver of their right of trial by jury.

> "In considering the question of waiver, a distinction must be made between an entire lack of matter of equitable cognizance, and cases within the field of equitable jurisdiction but in which an element essential to plaintiff's right to call upon the court for relief is lacking. Where the cause is entirely outside the field of equitable cognizance, the objection is not waived *by failure to interpose it at any particular time,* but is available at any stage of the proceeding." (Italics ours.)
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> 21 C. J. sec. 149 (p. 168);
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> Southern Pacific Co. v. U. S., 200 U. S. 341.

Finally, and to settle the matter, the lawfulness of the order directing this case to be heard before a chancellor according to equity procedure was litigated before the circuit court of appeals and respondent did not there take the position, *which it advances here for the first time,* that petitioner has waived his right to attack the order.

Respectfully submitted,

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